

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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| In the Matter of |) | |
| |) | |
| Federal-State Joint Board on Universal Service |) | CC Docket No. 96-45 |
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| 1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms |) | CC Docket No. 98-171 |
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| |) | |
| Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990 |) | CC Docket No. 90-571 |
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| Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size |) | CC Docket No. 92-237 |
| |) | NSD File No. L-00-72 |
| |) | |
| |) | |
| Number Resource Optimization |) | CC Docket No. 99-200 |
| |) | |
| Telephone Number Portability |) | CC Docket No. 99-200 |
| |) | |
| Truth-in-Billing and Billing Format |) | CC Docket No. 95-116 |
| |) | |
| American Public Communications Counsel Petition for Reconsideration |) | CC Docket No. 98-170 |
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**REPLY COMMENTS OF THE CENTRAL ATLANTIC PENNSYLVANIA
PAYPHONE ASSOCIATION**

The Central Atlantic Pennsylvania Payphone Association ("CAPA") submits these Reply Comments in response to the Comments filed by the Verizon companies ("Verizon") and Qwest Corporation ("Qwest") in opposition to CAPA's Petition for

Clarification or, in the Alternative Reconsideration of the Commission's February 14, 2008 Order on Reconsideration ("*February 14, 2008 Order*").¹

In their comments, Verizon and Qwest attempt to inject confusion in this proceeding where none exists by claiming refunds are barred by the principle of retroactive rulemaking. However, this principle has no validity in this case as the law is clear and the law has always been clear. As explained in the *February 14, 2008 Order*, Verizon and Qwest cannot now and could not before assess non-cost based charges on payphone service providers ("PSPs"). Their decision to do exactly this effective April 1, 2003 under guise of the *Centex Waiver Order* was not reasonable. Without any legal basis upon which to base their actions, Verizon and Qwest's arguments here that they were acting in accordance with the law that was suddenly changed is absurd.

The *February 14, 2008 Order* does not announce a "new rule," it involves a clarification of applicability of an existing rule – the interim waiver – a clarification that has only been necessitated by the actions of Verizon and Qwest to inject confusion where none existed. Because this matter involves clarification of an existing rule, rather than establishment of a new rule – the principle prohibiting retroactive rulemaking simply has no relevance here.

Verizon and Qwest's past refusal to comply with the clear directives of this Commission has inflicted substantial financial harm on PSPs. To rectify this harm and to make clear to Verizon and Qwest that their flagrant disregard of this Commission's clear precedent will not be tolerated, CAPA respectfully requests that the Commission grant its

¹ *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96045, Order on Reconsideration released February 14, 2008 ("*February 14, 2008 Order*").

Petition and direct that refunds be issued to payphone providers that have been assessed charges since April 1, 2003 in accordance with the *Centrex Waiver Order*.

I. The Commission's *February 14, 2008 Order* Did Not Change A Previous Rule

Both Qwest and Verizon advocate that the Commission's *February 14, 2008 Order* was a "new rule." As such, they argue that the Commission cannot order refunds because it would be violating retroactive rulemaking principles. However, this argument has no merit. The *February 14, 2008 Order* makes clear that the Bell Operated Companies ("BOCs") had no legal basis upon which to apply the interim waiver granted by the *Centrex Waiver Order*² to PSPs. Further, the *February 14, 2008 Order* indicates that Verizon and Qwest could not have reasonably believed that such action would be permitted because of the Commission's other orders regarding PSPs. These other orders make clear that the non-cost based charges applied to payphone providers ostensibly pursuant to the interim waiver were impermissible. There simply is no "old rule" that is being usurped by a "new rule;" rather, the Commission's *February 14, 2008 Order* is a decision informing the BOCs that their interpretation of the interim waiver was not legally supportable. The BOCs had no reason to believe otherwise while this proceeding has been pending. Therefore, retroactive rulemaking is not an issue in this case and Verizon and Qwest's arguments must be rejected. The Commission must grant CAPA's Petition and direct that refunds be issued to payphone providers that have been assessed charges since April 1, 2003 in accordance with the *Centrex Waiver Order*.

² *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Order and Second Order on Reconsideration, 18 FCC Rcd 4818, ¶¶ 3-9 (2003) ("*Centrex Waiver Order*").

A. The text of the *February 14, 2008 Order* makes clear that the BOC interpretation of the *Centrex Waiver Order* was not legally supportable.

Qwest and Verizon both attempt to argue that the Commission's *Centrex Waiver Order* was clear that it applied to PSPs. In fact, their entire advocacy rests on this claim. However, there is no factual or legal basis to support this. Rather, the Commission's *February 14, 2008 Order* draws the exact opposite conclusion – that Verizon and Qwest should have known that the interim waiver did not apply to payphone providers.

The applicable rule in this case is 47 C.F.R. § 54.712 which establishes the Commission's general rule precluding telecommunications carriers from marking up universal service line-item amounts above the relevant contribution factor.³ The only deviation from this general rule was a limited and interim waiver to allow local exchange carriers ("LECs") to recover a share of their contribution costs to universal service from Centrex customers from multi-line business customers.⁴ In the *Centrex Waiver Order*, the Commission made clear that its general policy was its preferred approach and that the waiver was limited and would only apply on an interim basis.

The *Centrex Waiver Order* did not specifically address PSPs – for which there is a long line of separate cases and proceedings addressing issues specific to them apart from the larger class of "multi-line business customers." In the absence of a specific reference to PSPs in the *Centrex Waiver Order*, the BOCs, including Verizon and Qwest, unilaterally decided to apply the interim waiver to PSPs and began assessing PSPs universal service line item rates which included recovery for the costs of providing universal service discounts to Centrex customers. Subsequently, on April 30, 2003, the

³ *Centrex Waiver Order* at ¶ 2.

⁴ *Centrex Waiver Order* at ¶ 3, 7, and 9.

American Public Communications Council ("APCC") filed a Petition for Reconsideration of the *Centrex Waiver Order* advocating that application of the interim waiver to PSPs was inconsistent with the Act and the Commission's policies regarding PSPs.

Five years later, the *February 14, 2008 Order* addressed application of the interim waiver of 47 C.F.R. § 54.712 to PSPs to make clear that carriers are prohibited from assessing PSP charges in excess of the carrier's universal service fund contribution factor.⁵ Despite Verizon's attempts to misconstrue the text of the *February 14, 2008 Order*,⁶ the Commission nowhere stated that the interim waiver applied to payphone providers in the first instance. Rather, this is the interpretation taken unilaterally by the BOCs that Verizon and Qwest now want to be accepted as though it was and always had been black-letter law. Since there is no support for this position, it must be rejected.

The *February 14, 2008 Order* analyzes Commission decisions regarding PSPs including the *Wisconsin Payphone Order*⁷ which specifically makes clear that BOC payphone line rates could not include subsidies for other services.⁸ The *Wisconsin*

⁵ *Federal-State Joint Board on Universal Service, 1998 Biennial Regulatory Review - Streamlined Contributor Reporting Requirements*, CC Docket No. 66-45, Report and Order and Second Further Notice of Proposed Rulemaking, 17 FCC Rcd 24952 (2002) (*Interim Contribution Methodology Order*).

⁶ *Verizon Opposition* at 3. Verizon states that the Commission "noted that the *Centrex Waiver Order* 'applied to independent payphone service providers . . .'." This statement in full context reads:

For the reasons stated herein, we agree with APCC that, as applied to independent payphone service providers (PSP), the decision in the *Centrex Waiver Order* does not further the stated goal of section 276 to "promote the widespread deployment of payphone services to the general public." (emphasis added).

February 14, 2008 Order at 2, ¶ 1. Read in the proper context, the meaning of this statement is exactly the opposite of Verizon's representation in its comments.

⁷ *Wisconsin Public Service Commission Order Directing Filings, Memorandum Opinion and Order*, Bureau/CPD No. 00-01, 17 FCC Rcd 2051 (2002) (*"Wisconsin Payphone Order"*).

⁸ *February 14, 2008* at ¶ 18.

Payphone Order was issued prior to the *Centrex Waiver Order*, thus making clear the Commission's intention that PSPs cannot be charged non-cost based rates.⁹

While the *Centrex Waiver Order* never specifically references PSPs, the Commission issued its *PICC Order* while APCC's Petition for Reconsideration in this matter was pending and concluded that "it is bad policy to impose a non-cost-based charge. . . on payphone lines because doing so may limit the deployment of payphone services that serve these important functions."¹⁰ Since the charges at issue in this case are non-cost based rates, this provided BOCs even more notice that the charges were impermissible. It is clear that the purpose of the Commission's analysis of its PSP cases in the *February 14, 2008 Order* is to make clear that BOCs have been well advised by Commission precedent that PSPs are not to be treated the same as other multi-line customers. In sum, the BOCs' decision to apply the interim waiver to PSPs to assess them non-cost based charges was never established as a legally permissible right or a rule despite Qwest and Verizon's arguments to the contrary. Consequently, the Commission's *February 14, 2008 Order* did not change a legally established right or rule and retroactive rulemaking principles are not an issue here to foreclose the Commission from granting CAPA's Petition and directing refunds.

B. Neither the Practical Logistics of Implementing Order Nor the Implementation of a Tariff Negates the Right to Refunds.

Verizon argues that the Commission intended its *February 14, 2008 Order* to apply prospectively because it gave PSPs 30 days to identify themselves to the BOCs and

⁹ *February 14, 2008 Order* at ¶¶ 6-7.

¹⁰ *In the Matter of Access Charge Reform*, CC Docket No. 96-262, Order on Reconsideration, 18 FCC Rcd 12626, ¶ 8 (2003)(*PICC Order*); CAPA Petition at 4.

the BOCs 90 days to comply with the directives.¹¹ Again, Verizon misconstrues the context of the Commission's Order. Nothing in the *February 14, 2008 Order* limits the BOCs' "compliance" to prospective charges. In fact, the Order is absolutely silent on the issue of refunds. It is the BOCs, once again, who are choosing to interpret the *February 14, 2008 Order* to mean that refunds are not required. This is similar to the BOCs decision five years ago to conclude that the interim waiver applied to PSPs – despite the *Centrex Waiver Order*'s silence on the issue and the other Commission cases specifically addressing PSPs. The Commission's logistical directives to require compliance with its Order is not instructive regarding the intent of the Order about refunds. In fact, the ordering paragraph referenced by Verizon can just as easily be read to mean that compliance with the Order means that the BOCs are to issue refunds within 90 days.¹²

Likewise Verizon attempts to bolster its position that it acted properly to assess these charges over the past five years by claiming that it has a tariff in effect.¹³ However, as Verizon acknowledges, these tariff provisions were "deemed effective" merely by operation of law. Regardless of this, a tariff that contains illegal provisions cannot be used to provide cover for illegal activities. The Commission always has the right to conclude that tariffs provisions are illegal. In this case, the Commission has done so in its *February 14, 2008 Order*. Therefore, the fact that a tariff was in effect is irrelevant to whether or not the Commission intended to require refunds in its *February 14, 2008 Order*.

¹¹ Verizon Opposition at 3-4.

¹² *February 14, 2008 Order* at ¶ 9.

¹³ Verizon Opposition at 7-10.

C. The February 14, 2008 Order is a clarification of an interpretation of a previously granted interim waiver.

The oppositions of both Verizon and Qwest rely on the prohibition of retroactive rulemaking to argue that the Commission cannot grant CAPA's petition and direct refunds. The core premise of this legal principle – as recognized by both Verizon and Qwest – is that parties acting in accordance with a law that is subsequently changed should not be punished for their previous compliance.¹⁴ Aside from the fact, as discussed above, that the law did not allow assessment of these charge on PSPs in the first instance, is the fact that this case involves a clarification of a previous law and not a new application of a reasonably clear prior law. Therefore, reading a presumption of retroactivity in the context of the *February 14, 2008 Order* is appropriate.¹⁵

APCC, and now CAPA, have steadfastly maintained throughout this long proceeding that the interim waiver order as applied to PSPs is impermissible. As succulently stated by APCC in May 2003, it sought "reconsideration only to the extent required to prevent the BOCs from imposing charges on PSPs when these charges are to subsidize Centrex customers."¹⁶ Squarely before this Commission in this proceeding is a

¹⁴ As discussed above, in this case, the Commission has concluded that the BOCs were not in fact operating in accordance with the law. Rather, they chose the most self-advantageous interpretation of the law and proceeded accordingly despite the Commission's clear guidance in other proceedings that such interpretation was not legally permissible.

¹⁵ *Communications Vending Corporation of Arizona, Inc. v. Citizens Communications Company*, File Nos. EB-02-MD-018-030, Memorandum Opinion and Order at ¶ 33 (rel. November 19, 2002) quoting *Verizon v. FCC*, 269 F. 3d 1101 at 1109-10 (D.C. Cir. 2001). As discussed above, the BOC's decision to apply the interim waiver to PSPs was not reasonable and not clearly appropriate. Therefore, the starting point of analysis is not a clear prior law that was changed by the *February 14, 2008 Order*. Rather, the starting point for analysis is the proper interpretation of the prior law – it makes no difference for this purpose that the clarification took five years to be issued. The key point is that the *February 14, 2008 Order* was indeed a clarification and not an announcement of new law.

¹⁶ APCC Reply to Comments dated May 23, 2003 at 2. Verizon's attempts to claim that because APCC filed a petition for reconsideration, it somehow acknowledged that the BOC interpretation of the *Centrex Waiver Order* as applied to PSPs was legally permissible must be rejected. The Commission's rules require Petitions for Reconsideration and do not have provisions using to otherwise title documents as "clarification" or "modification." See 47 C.F.R. § 1.429(a).

request to clarify its interim waiver order in its applicability to PSPs. Ultimately, the Commission rightfully concluded that the interim waiver cannot and does not apply to PSPs. Procedurally, there can be no doubt that the *February 14, 2008 Order* is exactly the type of order that the D.C. Circuit court views as appropriate to start with a presumption of retroactivity.¹⁷

Despite this, as the comments of Verizon and Qwest make clear, the BOCs have refused to pay the PSPs refunds for the overcharges they have levied since April 1, 2003. That is why CAPA was compelled to file this Petition – without clear directives from this Commission, the BOCs cannot be expected to act in accordance with the law. For these reasons, the Commission must grant CAPA's Petition and make clear to the BOCs that they are required to issue refunds.

II. Equity Demands Refunds

As detailed in CAPA's Petition, the issue of refunds "boils down to a question of concerns grounded in notions of equity and fairness."¹⁸ In response, both Verizon and Qwest counter that they were permitted to assess the charges.¹⁹ As discussed above, this is simply not accurate. Verizon's further claim that "all parties in this instance acted in accordance with the Commission's unambiguous rules" ignores the reality that PSPs had no choice but to pay the charges assessed by the BOCs and to continue to pay them for five years pending regulatory relief.

Verizon and Qwest's arguments are similar to claiming that the nanny who steals a piece of jewelry from the homeowner's extensive collection has acted properly until the

¹⁷ *AT&T v. FCC*, 454 F.3d 329, 332 (D.C. Cir. 2006).

¹⁸ CAPA Petition at 5.

¹⁹ Verizon Opposition at 7; Qwest Opposition at 6.

homeowner discovers the theft and tells the nanny that it was wrong – even if the homeowner told the nanny in the context of another discussion that theft was wrong. Neither the nanny nor the BOCs should be permitted to reap the benefit of their improper actions by claiming that they were acting properly until being informed that their specific actions were wrong. Just like the nanny has no entitlement to the homeowner's jewelry regardless of when or how long it takes the homeowner to discover the theft and reclaim the property, the BOCs have no entitlement to the charges they collected from PSPs over the past five years by claiming that they were permitted to collect them pursuant to their unilateral interpretation of the interim waiver. Like the nanny, during the five years they received the payments, the *February 14, 2008 Order* concludes that the BOCs were on notice that collection of non-cost based charges from payphone providers was illegal – both through other orders of the Commission as well as the filing by APCC of the petition for reconsideration that lead to the *February 14, 2008 Order*.

Despite this, the BOCs chose to demand improper payments from PSPs for five years. Claiming now that the Commission's *February 14, 2008 Order* was a "change in law" or a "new rule" is simply disingenuous and the argument must be summarily rejected. Like the nanny who should atone for her theft even if takes the homeowner five years to discover the stolen jewelry and tell the nanny she acted improperly, so too must the BOCs be held accountable for their impermissible actions and a refund be ordered.

The reality here is that the BOCs made a risk assessment of the situation and chose to "take their chances" in applying an interim waiver of a rule to payphone providers even though there was no clear right to do so. On the other hand, payphone providers had no choice but to pay the overcharges and wait five years for regulatory

relief. During these past five years, the gamble paid off for the BOCs because they have been able to collect and keep these improper charges. Now, when the Commission has specifically told the BOCs that they had no right to these charges, the BOCs are choosing to take the gamble again and refusing to issue refunds, again requiring PSPs to seek further regulatory relief.

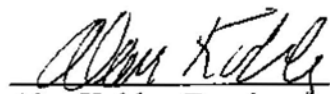
Qwest and Verizon simply cannot counter the clear injustice that PSPs have been forced to bear in this matter which weighs in favor of directing refunds. To add more insult to injury, Verizon even admits that it has the potential to recover these overcharges from its other multi-line customers.²⁰ PSPs have had no such pool upon which to absorb these overcharges that they had to pay over the past five years. To claim that refunding these overcharges will result in a "windfall" to PSPs does not lessen the inequity suffered by PSPs required to pay overcharges for the past five years that were clearly illegal and not permitted. In this matter, fairness and equity clearly require the Commission to grant CAPA's petition and specifically declare that PSPs are entitled to be refunded the overcharges they have paid to the BOCs during the past five years.

²⁰ Verizon Opposition at 7-8. In APCC's May 2003 Reply, it estimated that in Pennsylvania requiring the other multi-line businesses to absorb the charges being assessed to payphone providers would result in about a \$.04 increase (i.e. the fee would increase from \$.95 to about \$.99 for those other customers). See *APCC Reply* dated May 22, 2003 at 5, n. 9.

III. CONCLUSION

For the forgoing reasons, CAPA requests that the Commission clarify its February 14, 2008 Order in this proceeding and direct that refunds be issued to PSP providers that have been assessed charges since April 1, 2003 in accordance with the Commission's interim waiver order.

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Dated: May 29, 2008